Filed 10/27/16 In re J.A. CA4/3

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

In re J.A. et al, Persons Coming Under the Juvenile Court Law.	
ORANGE COUNTY SOCIAL SERVICES AGENCY, Plaintiff and Respondent, v. R.E., Defendant and Appellant.	G053564 (Super. Ct. Nos. DP024904 & DP024905) O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Gary Bischoff, Temporary Judge. (Pursuant to Cal. Const., art. VI, § 21.) Reversed and remanded.

Jack A. Love, under appointment by the Court of Appeal, for Defendant and Appellant.

Leon J. Page, County Counsel, Karen L. Christensen and Aurelio Torre, Deputy County Counsel, for Plaintiff and Respondent.

No appearance for the Minor.

R.E. (Mother) appeals from the juvenile court's order terminating her parental rights to her two children J.A. and M.A. The sole issue raised on appeal concerns Orange County Social Services Agency's (SSA) lack of inquiry regarding the minors' American Indian heritage as required by the Indian Child Welfare Act (ICWA) (25 U.S.C. § 1901 et seq.). SSA concedes it failed to comply with the ICWA notice requirements and, therefore, the juvenile court erred in terminating parental rights in the absence of proper inquiry and notice. SSA agrees with Mother the matter should be remanded to the juvenile court to ensure compliance. We order a limited reversal of the judgment and remand the matter with directions to effectuate proper notice under ICWA and for further proceedings.

I

The facts giving rise to the dependency proceeding and those concerning the reunification period are not relevant to the discrete issue raised in this appeal and need not be summarized. We will limit our discussion to the undisputed facts related to the ICWA issue.

At the detention hearing, Mother informed the court she had been adopted and the adoption paperwork indicated her biological father had Indian ancestry. The court ordered SSA to find the adoption file and investigate Mother's ancestry. The record shows SSA requested Mother's adoption records, but there is no other information about what steps SSA took to comply with the court's order.

In a report prepared for the six-month review hearing, the social worker stated ICWA did not apply. The reporting social worker simply noted a different social worker had completed an online "Post Adopt Inquiries form" and said "there was not anything in the file to determine ICWA standing." At the contested 12-month review hearing, the court terminated reunification services and scheduled a permanency hearing

under Welfare and Institutions Code section 366.26[1] (permanency hearing). Mother was not present at the permanency hearing, and counsel for both sides indicated there would be no argument. The court determined the minors were likely to be adopted, there were no applicable exceptions to terminating parental rights, and those rights must be terminated. The court made no ICWA findings.

II

A. ICWA Notice Requirements

"The minimum standards established by ICWA include the requirement of notice to Indian tribes in any involuntary proceeding in state court to place a child in foster care or to terminate parental rights 'where the court knows or has reason to know that an Indian child is involved.' (25 U.S.C. § 1912(a).) 'If the identity or location of the parent or Indian custodian and the tribe cannot be determined, such notice shall be given to the Secretary in like manner, who shall have [15] days after receipt to provide the requisite notice to the parent or Indian custodian and the tribe.' (*Ibid*.) The 'Secretary' refers to the United States Secretary of the Interior (25 U.S.C. § 1903(11)), whose department includes the [Bureau of Indian Affairs] BIA." (*In re Isaiah W.* (2016) 1 Cal.5th 1, 8 (*Isaiah W.*).)

"ICWA's notice requirements serve two purposes. First, they facilitate a determination of whether the child is an Indian child under ICWA. [Citation.] BIA guidelines in effect at the time of [these dependency proceedings] 'ma[de] clear that the best source of information on whether a particular child is Indian is the tribe itself.' [Citations]." (*Isaiah W., supra,* 1 Cal.5th at p. 8; see U.S. Dept. of the Interior, BIA, Guidelines for State Courts and Agencies in Indian Child Custody Proceedings, 80 Fed.Reg. 10146, 10153 (Feb. 25, 2015) ["Only the Indian tribe(s) . . . may make the determination whether the child" is an Indian child under ICWA].)

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[1] All further statutory references are to the Welfare and Institutions Code, unless otherwise indicated.

"Second, ICWA notice ensures that an Indian tribe is aware of its right to intervene in or, where appropriate, exercise jurisdiction over a child custody proceeding involving an Indian child. [Citations.] 'No foster care placement or termination of parental rights proceeding shall be held until at least [10] days after receipt of notice by the parent or Indian custodian and the tribe . . . .' [Citation.] In enacting these provisions, 'Congress was concerned not solely about the interests of Indian children and families, but also about the impact on the tribes themselves of the large numbers of Indian children adopted by non-Indians.' [Citations.]" (*Isaiah W., supra,* 1 Cal.5th at pp. 8-9.)

"In 2006, our Legislature enacted provisions that affirm ICWA's purposes (§ 224, subd. (a)) and mandate compliance with ICWA '[i]n all Indian child custody proceedings' (*id.*, subd. (b)). Section 224.2 codifies and elaborates on ICWA's requirements of notice to a child's parents or legal guardian, Indian custodian, and Indian tribe, and to the BIA. In addition to requiring notice to the BIA 'to the extent required by federal law,' the statute requires any notice sent to a child's parents, Indian custodians, or tribe to 'also be sent directly to the Secretary of the Interior' unless the Secretary has waived notice in writing. (§ 224.2, subd. (a)(4).) . . . Section 224.4 affirms that '[t]he Indian child's tribe and Indian custodian have the right to intervene at any point in an Indian child custody proceeding.' And importantly for our purposes, section 224.3, subdivision (a) . . . provides that courts and county welfare departments 'have an affirmative and continuing duty to inquire whether a child for whom a petition under [s]ection 300 . . . is to be, or has been, filed is or may be an Indian child in all dependency proceedings and in any judicial wardship proceedings if the child is at risk of entering foster care or is in foster care.'" (*Isaiah W., supra,* 1 Cal.5th at p. 9.) Among other things, ICWA notices must include "all names" and the birthdates of the child's biological parents. (§ 224.2, subd. (a)(5)(C).)

In this case, there is nothing in the record to confirm what information the social worker received from the adoption records and why the social worker believed there was no reason to pursue the matter further. Given the important interests protected by this legislative scheme, "the bar is indeed very low to trigger ICWA notice." (*In re Antoinette S.* (2002) 104 Cal.App.4th 1401, 1408.) Mother's claim her biological father had Native American ancestry was certainly enough to warrant ICWA notice.

In light of the above, the appropriate remedy is to grant a limited reversal and remand to permit compliance with the ICWA notice requirements, and upon compliance, to enable the juvenile court to reinstate its orders if no Indian tribe wishes to intervene. (See *In re I.B.* (2015) 239 Cal.App.4th 367, 375-376.)

B. SSA's Request for Guidance

In its respondent's brief, SSA concedes "ICWA inquiry and notice efforts are justified on remand" and it asks this court for "clarification as to the scope of such required efforts." It begins the discussion by clarifying SSA had no duty to "track down" Mother's adoption records. However, SSA acknowledges it has already accessed Mother's adoption information online and it has located its own internal files on the adoption. Because SSA has "ready access to such records in this case" it agrees to "investigate such information in a manner consistent with this Court's direction on remand."

Next, SSA maintains it wishes to "head off potential serial ICWA challenges" and it requires clarification on the expected "scope of, or legal restrictions on, its ability to disclose information gleaned from those adoption records within ICWA notices sent to outside entities." SSA notes adoption records are "typically confidential." (Citing Fam. Code, §§ 9200-9201 & 8611.) It also recognizes Family Code section 9201, subdivisions (e) and (f), permits SSA to disclose such information to the juvenile court and related agencies under certain circumstances. SSA questions whether the court's

original order, authorizing SSA to investigate Mother's adoption records to determine potential Indian ancestry was "sufficient to allow for dissemination of this information to the tribes and government entities, or whether further action by SSA, the juvenile court, and/or Mother is appropriate." These are all good and interesting questions.

However, courts may not render advisory opinions on disputes the parties anticipate might arise but which do not presently exist. (*Teachers' Retirement Bd. v. Genest* (2007) 154 Cal.App.4th 1012, 1043-1044.) Given the complete lack of information about the contents of the adoption documents, we would be forced to speculate about the nature of the information, hypothesize on legal restrictions, and guess what the possible future ICWA challenges may be.

SSA should keep in mind our review following any ruling on remand is limited: We review compliance with ICWA under the harmless error standard. (*In re E.W.* (2009) 170 Cal.App.4th 396, 402-403.) Notice is sufficient if there was substantial compliance with the applicable provisions of ICWA. (*In re Christopher I.* (2003) 106 Cal.App.4th 533, 566.)

Moreover, it does not appear further guidance from this court is really necessary. SSA has resources and existing case authority to draw from when proceeding with its ICWA notification duty on remand. As noted by SSA, there is statutory authority permitting the release of information in an adoption petition "if it is believed the child's welfare will be promoted thereby." (Fam. Code, § 9201, subd. (e).) Due to confidentiality concerns, the statutory provision expressly limits disclosure to a list of approved agencies. (*Ibid.*)

SSA may also find helpful the statutory and case authority regarding an adopted adult's right to learn about their Indian ancestry to receive services or benefits. (25 U.S.C. § 1917.) These cases appear to involve similar confidentiality and privacy concerns to the case before us.

For parents adopted in 1994 or after, there is Family Code section 8619 which provides as follows: "The [State Department of Social Services] department shall adopt rules and regulations it determines are reasonably necessary to ensure that the birth parent or parents of Indian ancestry, seeking to relinquish a child for adoption, provide sufficient information to the department . . . or [to the] licensed adoption agency so that a certificate of degree of Indian blood can be obtained from the [BIA]. The department shall immediately request a certificate of degree of Indian blood from the [BIA] upon obtaining the information. A copy of all documents pertaining to the degree of Indian blood and tribal enrollment, including a copy of the certificate of degree of Indian blood, shall become a permanent record in the adoption files and shall be housed in a central location and made *available to authorized personnel* from the [BIA] when required to determine the adopted person's eligibility to receive services or benefits because of the adopted person's status as an Indian. This information shall be *made available to the adopted person upon reaching the age of majority*." (Italics added.) "With these provisions in place, adopted parents can obtain the information about their Indian ancestry from BIA and provide it to the social worker or court as necessary." (*In re C.Y.* (2012) 208 Cal.App.4th 34, 41.)

We recognize Mother was born before 1994, before the above statute was enacted. For those individuals, there are several ICWA provisions permitting adopted adults to obtain tribal information from their confidential adoption records. SSA should consider reviewing the large body of out-of-state authority regarding the mechanism used by these individuals. (25 U.S.C. § 1917; American Indian Law Deskbook (2016 ed.) Conference of Western Attorneys General, § 13:29.)

For example, in *Matter of Adoption of Mellinger* (N.J.Super.App.Div. 1996) 672 A.2d 197, 199 (*Mellinger*), the court considered several ICWA provisions and held "Congress intended that the ICWA override the State's interest in confidentiality of

adoption records, where necessary, as part of a national policy recognizing the critical importance in preserving and protecting the essential tribal relations of Indian people." In that case the judge determined the adoption records did not reveal a tribal affiliation, but did disclose the names of the biological parents. (*Id.* at p. 199.) The judge recognized the identifying information about the natural parents was necessary to determine the natural mother's tribal affiliation. (*Ibid*.) The *Mellinger* court determined that while good cause existed to release the information, it was not necessary to turn it "over to petitioner directly in order to meet the ICWA's goal." (*Ibid*.) The court stated petitioner sought "the information to establish tribal affiliation rather than to discover the identify of her biological parents." (*Ibid*.) The *Mellinger* court suggested the trial judge "appoint a person to review the adoption records, conduct an investigation and report to the court the tribal affiliation, if any, of petitioner's natural parents." (*Ibid*.)

Similarly, courts in New York and Michigan have indicated it is possible to protect the biological parent's privacy rights and at the same time assure the petitioner's rights under ICWA by requiring that the identifying information be released to the appropriate Indian tribe with a request "that the Nation keep the information confidential. [Citation.]" (*Matter of Rebecca* (Surr. Ct., Rensselaer Co., 1993) 601 N.Y.S.2d 682, 684.) "It is the tribe, not the adoptee, which needs the information to establish tribal membership." (*Matter of Hanson* (Mich.App. 1991) 470 N.W.2d 669, 672.)

III

The judgment terminating parental rights is reversed as to both parents and the matter is remanded to the juvenile court with directions to reappoint counsel for the parents, hold a hearing to consider if additional orders are required given the confidential nature of the adoption report, and set a ICWA notice review hearing. At the review hearing, the court must determine whether SSA complied with the notice provisions of

ICWA and issue an order regarding whether ICWA applies. If ICWA applies, the court shall proceed according to those provisions. If it does not apply, the juvenile court shall reinstate all previous findings and orders made at the permanency hearing.

O'LEARY, P. J.

WE CONCUR:

FYBEL, J.

IKOLA, J.